Supreme Court, U.S.
FILED
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No. 00-

IN THE
Supreme Court of the United States

MARVIN DAVIS,

Petitioner,

v.

FLORIDA POWER & LIGHT CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

UNDER THE AMERICANS WITH DISABILITIES ACT, ARE ACCOMMODATIONS THAT CONTRAVENE THE SENIORITY RIGHTS OF OTHER EMPLOYEES PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT UNREASONABLE AS A MATTER OF LAW?

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on March 10, 2000, Petition for Rehearing and Rehearing *en banc* denied May 4, 2000 (App. C), by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Americans With Disabilities Act of 1990, 42 U.S.C. § 12111(9)(B):

> The term "reasonable accommodation" may include —
>
> > job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(a) and (b)(5)(A):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

As used in subsection (a) of this section, the term "discriminate" includes —

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

The National Labor Relations Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

> agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The National Labor Relations Act, 29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer --
>
> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

The National Labor Relations Act, 29 U.S.C. § 158(d), also is involved in the case. This provision is lengthy, and the pertinent text is thus set out in the Appendix, pursuant to Rule 14.1(f) and (i)(v).

STATEMENT OF THE CASE[1]

This Petition for Writ of Certiorari arises out of a lawsuit brought by the Petitioner, MARVIN DAVIS (hereinafter referred to as "DAVIS"), against the Respondent, FLORIDA POWER & LIGHT CO. (hereinafter referred to as "FPL"), based, *inter alia*, on FPL's failure to make reasonable accommodations to the known physical limitations of DAVIS, pursuant to the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12112(a) and (b)(5)(A).

In 1985, DAVIS began work with FPL, a utility company providing electricity to businesses and residences throughout

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1. The Statement of the Case is derived from the Opinion of the United States Court of Appeals for the Eleventh Circuit.

Florida (App. 2a).[2] Many of FPL's jobs require employees to *sometimes* work overtime (App. 2a). Prior to his 1990 back injury, DAVIS agreed, as a *condition* of employment, to work whatever schedule was necessary to help FPL meet its obligations to its customers. (App. 2a).

A collective bargaining agreement (hereinafter referred to as "CBA") with the International Brotherhood of Electrical Workers (hereinafter referred to as "the Union") governs FPL's relationship with many employees, including DAVIS (App. 3a). *Inter alia*, the CBA dictates how FPL assigns overtime work (App. 3a; App. 43a-50a). The CBA provides that FPL must offer *voluntary* overtime on a most-senior to least-senior basis (App. 3a; App. 43a-50a). If *involuntary* overtime is needed, it must be imposed on the most junior employees first (App. 3a; App. 43a-50a).

In 1990, DAVIS sustained a back injury on the job while working as a lineman (App. 3a). DAVIS was placed on "light duty" and later diagnosed as having a herniated disc (App. 3a).

In early 1994, DAVIS bid for and obtained a Connect and Disconnect ("C&D") position (App. 4a). The C&D position involves connecting and disconnecting electric service to FPL's customers by installing, removing and reading electric meters (App. 4a). DAVIS met the requirements listed on FPL's form entitled "Essential Job Functions — Connect & Disconnect Man." (App. 4a). The form and FPL's written job description for the C&D position do not address working hours or overtime work (App. 4a).

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2. "App." cites are to the Appendix materials attached hereto.

Similarly, the CBA lists the work schedule of a C&D employee simply as "five (5) days of eight (8) consecutive hours per day," although expressly granting to FPL "the right to require employees to work overtime." (App. 4a).

In 1996, DAVIS's doctor suggested that he work no more than eight hours per day because of his back condition (App. 4a). Thereafter, DAVIS requested that FPL accommodate his disability by requiring of him only selective overtime, allowing him to decide each day whether to work overtime depending on his personal assessment of his back condition at the end of his regular shift (App. 5a). FPL refused this specific request and terminated DAVIS in March 1997 (App. 5a).

Thereafter, DAVIS filed his lawsuit alleging, *inter alia*, disability discrimination in violation of the Americans with Disabilities Act of 1990 (hereinafter referred to as "ADA") (App. 6a).

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

On or about January 7, 1999, the United States District Court for the Southern District of Florida granted FPL's Motion for Summary Judgment. (App. 16a-35a). DAVIS had contended before the district court, *inter alia*, that leaving the question of working overtime to a case-by-case determination, based on the condition of his back at the end of any particular day, was a reasonable accommodation (App. 21a). The district court disagreed, *acknowledging initially that "reasonableness" is often a jury question*, but holding that "[P]laintiff's requested accommodation was, at a minimum, inconsistent with the rights of his co-workers

under the terms of the [CBA]" and, "[a]s such, it was unreasonable as a matter of law. . . ." (App. 28a).

Subsequently, on or about March 12, 1999, DAVIS learned that approximately ten (10) days earlier, the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") had issued its "Enforcement Guidance: "Reasonable Accommodation and Undue Hardship Under the ADA," 3 EEOC Compliance Manual (BNA) N:2465 (hereinafter referred to as "Enforcement Guidance") specifically addressing, *inter alia*, the precise question considered, in part, by the district court, involving potential conflict between an accommodation under the ADA and the provisions of a collective bargaining agreement. Because DAVIS believed that the EEOC's "Enforcement Guidance" conflicted directly with the district court's holding on the issue of the reasonableness of his proposed accommodation, DAVIS filed a Motion for Relief from Order pursuant to Federal Rule of Civil Procedure 60(b) (App. 6a). On or about March 24, 1999, the district court denied the Rule 60(b) Motion (App. 6a).

DAVIS timely appealed to the United States Court of Appeals for the Eleventh Circuit both the district court's Order granting summary judgment to FPL and its Order denying DAVIS's Rule 60(b) Motion (App. 6a).[3]

On or about March 10, 2000, the United States Court of Appeals for the Eleventh Circuit entered its Opinion and Judgment, affirming both of the district court's rulings, holding that DAVIS's requested accommodations of no or

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3. The EEOC filed an amicus brief supporting DAVIS's position.

selective overtime work contravened the seniority provisions of the collective bargaining agreement between the Union and FPL, and therefore were unreasonable accommodations as a matter of law (App. 11a-14a).

REASONS FOR GRANTING THE WRIT

Twenty-three (23) years ago, this Court decided *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (U.S. 1977), confronting for the first time the obvious tension between individual statutory employment rights[4] and collectively-bargained rights under the National Labor Relations Act of 1935. While recognizing that the "issue is important and warrants some discussion," the Court held that the duty to accommodate religious beliefs under Title VII does not require employers to take steps inconsistent with an otherwise valid collective bargaining agreement. *Hardison*, 432 U.S. at 79.

Significantly, however, the Court based its holding in *Hardison* on the fact that Title VII contained *no clear and express indication from Congress* that collectively bargained rights must give way when necessary to accommodate religious observances. *Id.*

Now, however, twenty-three (23) years after *Hardison*, MARVIN DAVIS asks this Court to review a decision issued by the United States Court of Appeals for the Eleventh Circuit, which is in direct conflict with *Hardison*. Thus, DAVIS asks this Court to review whether the duty to accommodate physical limitations under the ADA, *in light*

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4. The particular statute at issue in *Hardison* was Title VII of the Civil Rights Act of 1964.

of its clear statutory language and legislative history, which recognizes competing provisions of a collective bargaining agreement as relevant but not necessarily determinative, *may* require employers to take steps inconsistent with an otherwise valid collective bargaining agreement.

DAVIS therefore believes compelling reasons exist for granting this Petition for Writ of Certiorari, insofar as the Eleventh Circuit in this case has decided an important question of federal law that has not been, but should be, settled by this Court, and which conflicts with this Court's decision in *Hardison*.

The Eleventh Circuit, joining eight (8) other circuits,[5] held, similar to this Court in *Hardison*, that an accommodation that contravenes the seniority rights of other employees under a collective bargaining agreement is unreasonable *as a matter of law* (App. 11a-14a).

Unlike Title VII though, which this Court examined in *Hardison*, in both the language and the legislative history of

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5. *Feliciano v. Rhode Island*, 160 F.3d 780 (1st Cir. 1998); *Kralik v. Durbin*, 130 F.3d 76 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995); *Willis v. Pacific Maritime Ass'n*, 162 F.3d 561 (9th Cir. 1998); *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998). A panel of the United States Court of Appeals for the District of Columbia has also considered the issue, and in fact, reached a contrary result; however, a full panel vacated the opinion, re-heard the issue *en banc* and did not reach a holding on this issue. *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997), *vacated*, 156 F.3d 1284 (1998) (*en banc*).

the ADA, Congress evidenced that it intended a different result under that statute. The Eleventh Circuit's holding in this regard, however, as well as that of the other circuits deciding this issue, ignores the pertinent legislative history supporting the conclusion that under the ADA, collective bargaining agreements, including those provisions impacting seniority, were not intended to "trump" reasonable accommodation claims as a matter of law:

> the collective bargaining agreement could be *relevant* . . . in determining whether a given accommodation is reasonable. ***However, the agreement would not be determinative on this issue.***

H.R. Rep. No. 101-485, 101st Cong., 2d Sess. 63 (1990) (House Report) (also noting that an employer's duty to comply with ADA is " 'not affected by any inconsistent term of any collective bargaining agreement to which it is a party' "); *accord* S. Rep. No. 116, 101st Cong., 1st Sess. 32 (1989) ("Senate Report").

Moreover, the ADA's legislative history suggests that employers and unions include a clause in collective bargaining agreements that would permit employers to take all actions necessary to comply with the duties imposed by the ADA as a simple means of avoiding conflicts between the agreement and the employers' duty to provide reasonable accommodation. S. Rep. No. 101-116, 101st Cong., 2nd Sess. 32 (1989); H.R. Rep. 101-485, 101st Cong., 2nd Sess. 63 (1990). Indeed, the extant CBA in the case at bar does just that by giving courts discretion to suspend any part of the CBA if such part is construed to be in conflict with any mandatory state or federal laws (App. 50a).

The CBA further provides that in such circumstances, the appropriate mandatory provision of the state or federal laws shall prevail. (App. 50a).

Additionally, the ADA's text includes a specific provision concerning the interaction between reasonable accommodation and collective bargaining agreements:

> Discrimination includes a covered entity's participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with [a] . . . labor union. . . .)

42 U.S.C. § 12112(b)(2).

In this way, the ADA differs from other anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, as well as the ADA's predecessor, the Rehabilitation Act of 1973, all of which contain *express* exceptions only for bona fide seniority systems. *Compare* 42 U.S.C. §§ 12101 *et seq.* (ADA) *with* 42 U.S.C. § 2000e-2(h) (Title VII) *and* 29 U.S.C. § 623(f)(2) (ADEA).

In *Hardison*, 432 U.S. at 81-83, this Court relied on the express seniority exemption in Title VII to hold that an employer need not change an employee's shift as a reasonable accommodation to his religious beliefs where it would violate other employees' rights under a collectively bargained seniority system. The Court reasoned that because "[c]ollective bargaining . . . lies at the core of our nation's

labor policy, and seniority provisions are universally included in these agreements," without "a clear and express indication from Congress," it would not hold that "an agreed upon seniority system must give way when necessary to accommodate religious observances." *Id.* at 79. The omission of an express exemption for seniority systems in the ADA, with the concomitant Congressional admonition that while collective bargaining agreements are relevant but not determinative to the question of an accommodation's reasonableness, provides just such a "clear and express indication" that Congress intended that collectively-bargained seniority rules, like other contractual provisions, may have to give way when necessary to accommodate disabled employees.

Moreover, the plain text of the ADA contains language which suggests that seniority systems might, in certain circumstances, yield to reasonable accommodation claims. *Kralik v. Durbin*, 130 F.3d 76, 86 (3d Cir. 1997) (*Mansmann, J. dissenting*). Unlike the Rehabilitation Act and Title VII, the ADA defines the term "reasonable accommodation" to include: "job restructuring, part-time or *modified work schedules*, reassignment to a vacant position, acquisition or modification of equipment . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). In a unionized workplace, these potential accommodations will almost always conflict to some degree with established seniority systems. *Kralik*, 130 F.3d at 86 (*Mansmann, J. dissenting*). The ADA, however, indicates that these accommodations should be made available without addressing their impact on seniority concerns. *Id.*

In addition, by covering both employers and unions in the ADA, *see* 42 U.S.C. § 12111(2), Congress obviated the

need for a unilateral contractual breach by the employer and provided the statutory grounds for negotiated variances from collective bargaining agreement provisions in appropriate circumstances.

Still further, in dealing with the concept of "undue hardship," neither the Act itself nor its legislative history mentions a collective bargaining agreement as a bar to making a reasonable accommodation. In fact, the EEOC's regulations track the legislative history and specifically state that a collective bargaining agreement is only "relevant," and not dispositive, to the question of "undue hardship". *See* 29 C.F.R. § 1630.15(d).[6]

Following its regulations, the EEOC's "Enforcement Guidance" likewise suggests that an employer cannot claim that a reasonable accommodation imposes an undue hardship as a matter of law simply because it violates a collective bargaining agreement.[7]

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6. These regulations were issued pursuant to statutory mandate. 42 U.S.C. § 12116. Congress intended that "the Commission's regulations will have the force and effect of law." H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 82 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 365; S. Rep. No. 101-116, 101st Cong., 1st Sess. 43 (1989) ("Senate Report"). Courts therefore must defer to the regulations as long as they reflect a permissible or reasonable construction of the ADA and do not conflict with clearly expressed Congressional intent. *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

7. The Commission's guidance, as an interpretation of its own controlling regulations, is entitled to "substantial deference" and "must be given controlling weight unless . . . plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted).

The significance of this issue also has been discussed by legal commentators. *See* Jerry M. Hunter, *Potential Conflicts Between Obligations Imposed on Employers & Unions by the National Labor Relations Act & the Americans With Disabilities Act*, 13 N. Ill. U.L. Rev. 207 (1993); William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" after Eckles*, 9 St. Thomas L. Rev. 359 (1997).

CONCLUSION

For the foregoing reasons, Petitioner MARVIN DAVIS respectfully requests that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, as such is necessary to settle this most important question of federal law and to resolve the conflict between the Eleventh Circuit's decision in the instant case and this Court's decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (U.S. 1977).

Respectfully submitted,

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